

No. 16,195

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

BIENVENIDO VICTORIO SISON,

Appellee.

On Appeal from the United States District Court
for the Northern District of California.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This appeal is from a judgment and order (T. 26-27) of the United States District Court granting appellee's petition for naturalization in the exercise of the jurisdiction conferred upon it by Section 310(a) of the Immigration and Nationality Act (8 U.S.C. Section 1421).

Jurisdiction to review the judgment of the court below is conferred upon this Court by 28 U.S.C. Section 1291.

STATEMENT OF THE CASE.

The facts are not in dispute. Appellee, a citizen of the Republic of the Philippines, served in the United

States Army (Philippine Scouts) from July 18, 1941 to August 22, 1945, and was honorably discharged for disability from wounds received in action (T. 11). Appellee receives disability compensation from the Veterans Administration (T. 11) and on July 1, 1956 came to the United States for medical treatment. He filed his petition for naturalization on July 10, 1957 (T. 8).

THE QUESTION PRESENTED.

The question involved can be very simply stated, viz.:

Does the savings clause of Section 405(a) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. Section 1101 Note) preserve the rights which had accrued to appellee under Section 2 of the Act of August 16, 1940 (54 Stat. 788) and Section 324 of the Nationality Act of 1940 (54 Stat. 1149, 8 U.S.C. former Section 724) by reason of his Army service?

ARGUMENT.

1. APPELLEE'S RIGHTS UNDER THE 1940 STATUTES.

At the outset it is necessary to consider just what rights were conferred upon appellee by reason of his Army service, under the two above cited statutes which were in effect prior to the Immigration and Nationality Act of 1952.

Section 2 of the Act of August 16, 1940, *supra*, provided as follows:

“Hereafter, service in the Regular Army honorably terminated shall be credited for purposes of legal residence under the naturalization laws of the United States, regardless of the legality or illegality of the original entry into the United States of the alien, the certificate of the honorable termination of such service or a duly authenticated copy thereof made by a naturalization examiner of the Immigration and Naturalization Service being accepted in lieu of the certificate from the Department of Justice of the alien’s arrival in the United States required by the naturalization laws; and service so credited in each case shall be considered as having been performed immediately preceding the filing of the petition for naturalization.”

Appellee’s Army service from 1941 to 1945 brought him within the purview of that section, which operated to confer the following benefits upon him:

- (a) The period of his Army service could be counted as legal residence in the United States for naturalization purposes;
- (b) He was relieved of the requirement of establishing legal entry;
- (c) His Army service was to be considered as having been performed immediately preceding the filing of a naturalization petition.

Section 324 of the Nationality Act of October 14, 1940, ¹ supra, provided additional benefits to those who

¹Quoted in full in Appendix I, pp. i-iii of appellant’s brief.

had served a period aggregating three years in the armed forces, viz.:

(a) If the petition was filed while still in the service or within six months of discharge, the residence requirements for naturalization were entirely waived (subsection (a));

(b) If the petition was filed more than six months after discharge, the residence requirements were applicable but the military service was "considered as residence within the United States or the state" (subsection (d)).²

Appellee's service was in the regular Army (Philippine Scouts) subsequent to August 16, 1940 and such service aggregated a period in excess of three years. Thus, he was within the purview of both Section 2 of the Act of August 16, 1940, *supra*, and Section 324 of the Act of October 14, 1940, *supra*. Under the terms of the two sections just cited naturalization benefits appurtenant to appellee's Army service had accrued, therefore, as follows:

(a) He could use the period of his Army service as legal residence, regardless of how he might enter the United States;

(b) His Army service was regarded as having been performed immediately preceding the filing of a naturalization petition.

²The waiver of a certificate of arrival specified in Section 324(b)(2), applied equally to those who filed within six months of discharge and those who filed later (*In re Mike Shaltupsky*, D.C. E.D. Mo.), unreported.

It is probable that the benefit last mentioned was intended to give those individuals whose service was in the regular Army and who were unable within six months after such service to get to a place where naturalization courts were operating, the same benefits as though the petition had been filed within six months after their discharge from the Army. But whether or not this particular result was intended by Congress in enacting Section 2 of the Act of August 16, 1940, *supra*, at the very least that statutory provision operated to require that the Army service be considered as having been performed within five years of the date of filing the petition for purposes of subsection (d), *supra*, of Section 324 of the Nationality Act of 1940. This being so, for the purposes of that particular subsection, obviously appellee could use the period of Army service as legal residence and could tack additional residence (whether legal or illegal—whether temporary or permanent) to the military service period to compute the five years' residence for purposes of said subsection (d).

The foregoing were substantive statutory rights which had accrued to appellee by reason of his service in the regular Army for a period in excess of three years. Even if his eligibility under subsection (a) of Section 324, *supra*, lapsed six months after the service terminated because of his inability to file a petition during that time (and we think it did not lapse, because the Act of August 16, 1940 mandatorily required that his particular service should be considered as having been performed "*immediately preceding* the

filings of the petition for naturalization"), nevertheless and in any event, his rights to use the military service as legal residence for purposes of subsection (d) when filing more than six months after termination of the service still remained to him.

**2. THE SAVINGS CLAUSE OF THE 1952 ACT
PRESERVED APPELLEE'S RIGHTS.**

The foregoing statutory provisions remained in effect until their repeal by the Immigration and Nationality Act of 1952 (See 66 Stat. 280, Section 403 (a)(41) and (42)) but the repealing statute, in Section 405 thereof (8 U.S.C.A. 1101 Note), contained a specific saving clause, as follows:

“Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed * * * to affect * * * any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such * * * statutes (sic), conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect.”

Interpreting that section, the United States Supreme Court in

United States v. Menasche, 348 U.S. 528, 75 S.Ct. 513, 99 L.Ed. 615,

has said:

“The whole development in this general savings clause * * * manifests a well established Congressional policy *not to strip aliens of advantages gained under prior laws*. The consistent broadening of the savings provision, particularly in its general terminology, indicates that the policy of preservation was intended to apply to matters both within and without the specific contemplations of Congress” (emphasis supplied).

In that case the Supreme Court also said:

“The change in the section was designed to extend a savings clause already broadly drawn, and embodies, we believe, Congressional acceptance of the principle that the statutory status quo was to continue *even as to rights not fully matured*” (emphasis supplied).

We might well stop here. The language of the savings clause is plain. As to any status or right or condition or thing or matter which had existed at the time of the repeal, the repealed statutes (Section 2 of the Act of August 16, 1940 and Section 324 of the Nationality Act of October 14, 1940, *supra*) were continued in force and effect. Thus, benefits which had accrued under those statutes were not to be abrogated nor destroyed by the repeal. The accrued benefits appurtenant to appellee's Army service were: (a) to consider that service as residence for naturalization purposes and as having been performed immediately prior to filing of a petition for naturalization, and (b) to relieve the veteran of the requirement of proving lawful admission for permanent residence.

The savings clause of the 1952 Act was designed to prevent such benefits from being swept away.

In *Petition of DeMayo*, (D.C. Cal. N.D.) 146 F.S. 759, the Court considered a case on all fours with the case at bar. In that case the petitioner had served honorably in the United States Army from September 1941 to May 1946, a period of slightly less than five years. He came to the United States under a temporary type of admission on August 15, 1955. He filed his petition for naturalization on January 5, 1956. In that case the Court said:

“This petition, filed January 5, 1956, entitles the petitioner to have completed five years of residence in the United States if his service in the U. S. Army may be counted.

“Under 8 U.S.C.A. Section 724(d) in the Nationality Act of 1940, veterans may be naturalized more than six months after they have completed their service in the armed forces if they can establish residence in the United States for the required period * * * This section is supplemented by Section 2 of the Act (of August 16, 1940) * * * These sections were repealed by the Immigration and Nationality Act of 1952, but the repealing legislation contained a savings clause, 8 U.S.C.A. Section 1101 Note.”

After citing the decision of this Court in *Aure v. United States*, 225 F.2d 88, and the decision of the Supreme Court in *United States v. Menasche*, supra, the court went on to say:

“In like manner in the case at bar, *DeMayo* enjoyed a certain status or condition when he

completed his tour of duty in the Army in 1946. This was a substantive right as distinguished from a procedural remedy. Under the then law he was eligible to utilize that service and substantial right in completing the five years of residence required for obtaining naturalization. Despite his diligent efforts to act on his rights in a timely manner, he was frustrated (because he was stationed where there was no designated representative), until the present time from proceeding to obtain his citizenship.³ His status, however, was clearly established, and by reason of the savings clause it survived the repeal of the 1940 Act.

“*DeMayo* is now eligible to become a naturalized citizen of the United States of America.”

In *Aure v. United States*, *supra*, the appellant had more than three years’ service in the Navy prior to the 1952 Act, and was still in the service when he filed his petition in 1953. This Court held that the rights which had accrued to him under Section 324(a) of the Nationality Act of 1940 were preserved by the savings clause of the 1952 Act, stating

“Clearly, it is the teaching of the *Menachse* case, and we are satisfied it was the intent of

³In the case at bar appellee was prevented by causes beyond his control from petitioning for citizenship at an earlier time. He was unable to take advantage of the wartime provision for overseas naturalization (56 Stat. 182) because of serving in an area where no naturalization representative was available during the period of his service. He was unable to get to the United States to file a petition in a naturalization court, because he would have had to come under the quota which was preempted for approximately forty years by the waiting list (Cf. Report of President’s Commission on Immigration and Naturalization—1953—page 104). It was only when he was sent here for hospital treatment that he was able to come under a temporary status.

Congress, that the savings clause is not limited to cases involving affirmative action * * * but its preservation features should be extended to all substantive rights existing at the time the statute creating the rights was repealed."

In that case this Court went on to say:

"The real test is whether the right which the alien seeks to have preserved by the savings clause is a substantive right, and in this regard we are mindful of the distinction between substantive rights and procedural remedies (citing cases)."

The *Aure* case did not involve Section 2 of the Act of August 16, 1940, *supra*, (which applied only to Army service), nor did it involve subsection (d) of Section 324 of the Nationality Act of 1940, since *Aure* was still in the Navy when the petition was filed. However, the principle established by the *Aure* and the *Menasche* cases, *supra*, is that advantages enjoyed by aliens under prior laws were preserved by the savings clause of the 1952 statute, and that this was so "even as to rights not fully matured," provided only that it is a substantive right which is involved and not a mere procedural one.

3. THE BENEFITS OF THE 1940 STATUTES SURVIVED.

Appellant argues that appellee cannot meet the requirements of subsection (d) of Section 324, *supra*, because his service had not been performed within five years immediately preceding the filing of the petition. But Section 2 of the Act of August 16, 1940, *supra*,

specifically provided that service in the regular Army "shall be considered as having been performed immediately preceding the filing of the petition for naturalization."

Appellant contends that Section 2 of the Act of August 16, 1940, *supra*, was repealed by implication by the passage of the Nationality Act of August 16, 1940, which repealed the Naturalization Act of 1906. The contention that there was an implied repeal of Section 2 of the Act of August 16, 1940, *supra*, before its express repeal by Section 403(a)(41) of the 1952 statute (66 Stats. 280) is untenable. It is elementary, of course, that repeals by implication are not favored. Moreover, the fact that Congress in the 1952 Act expressly repealed Section 2 of the Act of August 16, 1940 is clear proof that Congress considered the latter section to have been in effect up to that time.

Appellant also argues that the reference in Section 2 of the Act of August 16, 1940 to "the naturalization laws" could only mean the Naturalization Act of 1906 which was then in effect and that, when the 1906 Act was superseded by the Nationality Act of October 14, 1940, the provisions of the August Act were rendered ineffective. It is quite evident, however, that Congress at the time of passage of Section 2 of the Act of August 16, 1940 was already considering the codification of the naturalization laws which it enacted fifty-nine days later. A complete answer, moreover, is that the 82nd Congress, in passing the Immigration and Nationality Act of 1952, made express provision for the repeal of Section 2 of the Act of August 16, 1940,

supra, and thus demonstrated that Congress considered it as being in effect up to that time.

Appellant's suggestion that the legislative history of the Act of August 16, 1940 indicates that it was special legislation, applicable to a specific class of enlisted men whom Congress desired to protect, is without substance. That Act dealt with two separate and distinct matters. Section 1 of that Act was enacted to permit the reenlistment and continuation in service until June 30, 1943 of non-citizen servicemen who otherwise could not receive pay because of restrictions in Army appropriation acts which prohibited payments to non-citizen personnel (other than the Philippine Scouts). That section dealt with the matter of easing certain existing pay restrictions,⁴ whereas, Section 2 of the Act was general in its terms, general in its coverage, and undertook to confer the specified privileges towards naturalization on the basis of any honorable service in the regular Army.

Clearly under Section 2, supra, appellee had the right to use his Army service as legal residence for purposes of naturalization as well as the additional right expressly provided in that section to have such service "considered as having been performed immediately preceding the filing of the petition for naturalization." Certainly these were substantive rights and not mere procedural ones. The statutory provisions under which they accrued were not repealed

⁴Subsequent appropriation acts exempted all military personnel from the pay restrictions (56 Stat. 613; 57 Stat. 349; 58 Stat. 575).

until the enactment of the 1952 Act, and the savings clause of the latter Act is applicable to them (*United States v. Menasche*, *supra*; *Aure v. United States*, *supra*; *Petition of DeMayo*, *supra*). Appellant's argument that five years after the Army service terminated, appellee lost the right to use it for purposes of Section 324 of the Nationality Act of 1940, *supra*, flies directly into the face of the express language of Section 2 of the Act of August 16, 1940, *supra*, that "service so credited in each case shall be considered as having been performed immediately preceding the filing of the petition for naturalization."

The case of

De La Cena v. United States, C.A. 9, 249 F.2d 341

which appellant cites, is clearly distinguishable because *De La Cena* had served less than three years prior to the repeal of the Nationality Act of 1940 and hence had never acquired the benefits of Section 324 of that Act, *supra*.

Appellant also contends that there was no eligibility or right to be naturalized which could be saved by Section 405(a) of the 1952 Act, *supra*, because appellee had no residence in the United States prior to the effective date of the latter statute. But the savings clause was designed to apply even "to rights not fully matured" (*United States v. Menasche*, *supra*), and appellee's Army service of more than three years gave him the statutory right to use the period of that service as lawful residence for naturalization purposes and to have it considered as having been performed

immediately prior to the filing of a petition for naturalization. Those rights were in existence when the 1952 Act came into effect. They were "advantages gained under prior laws" (*United States v. Menasche*, *supra*) and as such were within the scope of the general savings clause. The fact that appellee had been unable to get to the United States to exercise those rights certainly did not operate to take them out of the protection of the savings clause. There is, of course, a clear distinction between substantive rights, and the opportunity to exercise them, just as there is a clear distinction between substantive rights and procedural remedies (Cf. *Aure v. United States*, *supra*). The case of *Applications of Tano, et al.*, (D.C. Cal.) 139 F.S. 797, affirmed (C.A. 9) 237 F.2d 916, which appellant cites, is not in point because in that case the statutory right to be naturalized on the basis of sea service without a lawful admission had been terminated by express provision of the Internal Security Act of 1950, and was restored by the Immigration and Nationality Act of 1952 only to the extent of allowing such service performed prior to September 23, 1950, to be utilized *for a period of one year* without the necessity of showing lawful admission for permanent residence (8 U.S.C. Section 1441(a)(2)).

Little comment is needed to dispose of the argument that the United States would be precluded from making inquiry as to a petitioner's character, etc. if the rights hereinbefore discussed are now recognized. The Army records are available as to appellee's conduct and behavior during his more than four years of

Army service (which by statute is considered as having been performed immediately preceding the filing of the petition), and his character and behavior during the year of his physical presence in the United States is open to the same type of investigation which is customary in all other naturalization cases.

CONCLUSION.

Under the Acts of August 16, 1940 and October 14, 1940, *supra*, appellee, by reason of his service for more than three years in the regular Army, derived certain benefits, privileges and rights toward naturalization, i.e., to use said service for purposes of legal residence under the naturalization laws, to have it considered as having been performed immediately preceding the filing of a petition for naturalization, and to qualify for naturalization without the necessity of establishing legal entry for permanent residence. The statutory provisions which conferred these rights upon him on the basis of his Army service were not repealed until the 1952 Immigration and Nationality Act came into effect and the savings clause of Section 405(a) of that Act, *supra*, preserved the advantages and rights which had accrued under the earlier statutes. These were substantive rights and the fact that appellee, because of circumstances beyond his control, was unable to proceed to exercise them until after 1952 does not change or detract from the broad effect of the savings clause; the intent of that savings clause was to insure that aliens would not be stripped of

advantages gained under prior laws and this purpose was intended to apply even as to rights not fully matured (*United States v. Menasche*, *supra*; *Aure v. United States*, *supra*; *Petition of DeMayo*, *supra*).

We respectfully submit that the judgment of the court below granting appellee's petition for naturalization was correct and should be affirmed.

Dated, San Francisco, California,
May 8, 1959.

Respectfully submitted,
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